United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

77-7227

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

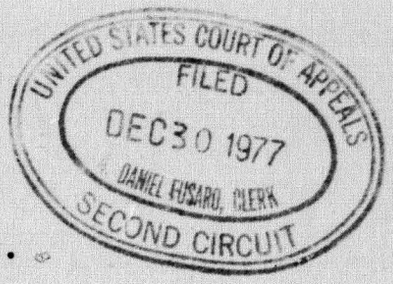
THE MUSLIM COMMERCIAL BANK LIMITED,

Plaintiff-Appellee,

v.

M. GOLODETZ & COMPANY and WATERMAN STEAMSHIP CORP.,

Defendants.



PUBALI BANK, RUPALI BANK, SONALI BANK and ADAMJEE JUTE MILLS, LTD.,

Plaintiffs-Appellants,

v.

M. GOLODETZ & COMPANY and WATERMAN STEAMSHIP CORP.,

Defendants.

On Appeal From The United States District Court
For The Southern District of New York

SUPPLEMENTAL REPLY BRIEF OF APPELLEE,
THE MUSLIM COMMERCIAL BANK LIMITED

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UNITED STATES COURT OF APPEALS
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PUBALI BANK, RUPALI BANK, SONALI BANK and ADAMJEE JUTE MILLS, LTD., Plaintiffs-Appellants, v. M. GOLODETZ & COMPANY and WATERMAN STEAMSHIP CORP., Defendants.	:	77-7227

SUPPLEMENTAL REPLY BRIEF OF APPELLEE,
THE MUSLIM COMMERCIAL BANK LIMITED

Preliminary Statement

This Supplemental Reply Brief is submitted on behalf of Appellee, The Muslim Commercial Bank Limited ("Muslim Bank"), in response to Appellants' Supplementary Brief and the views expressed in the letter, dated December 8, 1977, from the Deputy Legal Adviser to the Department of State, a copy of which is appended to the Memorandum

of the United States. We first reconsider certain aspects of the questions posed by the panel after oral argument in view of the Appellants' Supplementary Brief and the State Department's letter and then review the applicability of the Hickenlooper Amendment to these actions.

I

QUESTIONS POSED BY THE PANEL

A. Bangladesh's Confiscation Of The Bills Of Lading Did Not Effect A Taking Of The Jute Or The Proceeds Thereof Or Of Golodetz's Obligation To Pay For The Jute. (Question Nos. 1 and 2)

Appellants refer to Director der Disconto-Gesellschaft v. United States Steel Corp., 267 U.S. 22 (1925), to support their contention that the act of state doctrine requires enforcement of Bangladesh's confiscatory decrees with respect to the funds placed in escrow by Golodetz. Such reliance is misplaced.

Disconto-Gesellschaft involved the seizure of stock certificates which had been endorsed in blank and committed to the custody of the owner's agent in England. It is distinguishable in a number of respects from the

case presented here. The Court observed in Disconto-Gesellschaft that "certificates . . . so far represent the stock that ordinarily at least no one can get benefits of ownership except through and by means of the paper . . . ." 267 U.S. at 28. Since the bills of lading in this action were non-negotiable, they were not a device, and certainly not the exclusive device, by which to obtain the benefits of ownership of the jute. See Appellee's Supplemental Brief at 2-9.* And, even if it were assumed that the bills of lading were upon issue negotiable and therefore represented the jute and provided a device for transferring title to it, the Bangladeshi position could not be sustained. By the time of nationalization, the bills had been exhausted by delivery of the jute to CEA and no longer represented any interest in the jute itself and thus were not a "paper" by which any interest in the jute could have been transferred. See Appellee's Supplemental Brief at 9-16.

Furthermore, the bills of lading, unlike the stock certificates in Disconto-Gesellschaft, 267 U.S. at

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* The bills of lading, even if negotiable, were not negotiable instruments or securities. See Appellee's Supplemental Brief at 6 note. Accordingly, cases dealing with stock certificates and negotiable instruments such as bills and notes which embody intangible claims are inapposite.

28, are not a foundation upon which the claims asserted by the litigants can be based. Golodetz was not a party to the bills of lading and had no obligations under them. The obligations of the carrier, Waterman, under the bills of lading were discharged upon delivery of the jute to CEA. See Appellee's Supplemental Brief at 9-16. Finally, the statute of limitations for claims against Waterman for any alleged breach of its contract of carriage had run by the time the Bangladeshi Claimants commenced their action. Carriage of Goods by Sea Act, § 3(6), 46 U.S.C. § 1303(6).

Accordingly, transfer of possession, and even presumed lawful ownership, of the bills of lading pursuant to any of the nationalization decrees did not and could not transfer an interest in the jute or the proceeds thereof or in the debt of Golodetz under the contract of sale. Thus, for all of the reasons set forth above, Appellant's reliance on Disconto-Gesellschaft is misplaced, and that decision is largely irrelevant to the instant case.

B. The Armed Conflict In East Pakistan Was Not A War Between Pakistan And Bangladesh. (Question No. 3).

Appellants contend that the armed conflict in

East Pakistan constituted a war between Pakistan and Bangladesh. The authorities on which they rely, however, fail to support their contention and in fact support the proposition that there was no war between Bangladesh and Pakistan.

Civil war is not, as Appellants argue, synonymous with public war. Recognition of belligerency is required to transform a civil war into a public war:

> The existence of civil war or insurrection is a fact. Traditionally, the fact of armed rebellion has not been regarded as involving rights or obligations under international law . . . .
>
> Recognition of the belligerency of the insurgents by the parent State or of the contestants by foreign States changes the legal situation under international law.

10 M. Whiteman, Digest of International Law, § 2 at 30-31 (1968); accord, Restatement (Second) of the Foreign Relations Law of the United States, § 94, Comment e, Reporters' Note 1.

The Prize Cases, 67 U.S. (2 Black) 635 (1862), are not to the contrary. They involved seizures of vessels and cargos after Great Britain had recognized the belligerency of the Confederacy, declared its neutrality and claimed neutral trading rights. 67 U.S. (2 Black) at 669. Under established principles of international law, as set forth above and discussed in Appellee's Supple-

mental Brief at 17-18, this event made the civil strife a public war and permitted capture of the vessels by the Union which had set up a lawful blockade. 67 U.S. (2 Black) at 666-67.

The United States has never recognized a state of belligerency in East Pakistan by declaration of neutrality or otherwise. United States Foreign Policy for the 1970's, The Emerging Structure of Peace: A Report by President Richard M. Nixon to the Congress (February 9, 1972) [hereinafter Foreign Policy Report] does not contain or advert to any such declaration of neutrality. In fact, contrary to Appellants' assertion, this report demonstrates, in the words of President Nixon's letter of May 28, 1971 to the President of Pakistan, that the United States viewed the armed clash in East Pakistan as "civil strife". Id. at 159. The discussion in the report refers repeatedly to civil strife, to possible autonomy for East Pakistan within the nation of Pakistan and to Indian-supported guerrilla action along the border of East Pakistan. Id. at 162. The Foreign Policy Report further observes that "[w]e had known that danger of war would increase toward the end of 1971, as . . . India's military readiness improved and as the guerrilla forces completed training." Id. at 163 (emphasis in original). The report also notes, "[i]n late

November, open war on a broad front erupted between India and Pakistan". Id. at 164 (emphasis supplied). Thus, the Foreign Policy Report supports the position taken by Appellee that the only war which in fact existed was the war between India and Pakistan.

C. War Between Pakistan And Bangladesh (If Indeed It Ever Commenced) Ended On December 16, 1971. (Question No. 4)

Appellants seem to take the position that a state of war between Pakistan and Bangladesh (if indeed one ever existed) continues to this very day because no treaty of peace has been entered into by the two States. This position is untenable.* Any war that existed between the Bangladesh rebels and Pakistan ended with the cessation of

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* There is no reason for the Court to be reluctant to make such a determination. The cases relied on by Appellants in support of their position relate to a determination of the applicability of a particular United States statute or the propriety of the exercise of the war power of the United States Constitution. For instance, Ludecke v. Watkins, 335 U.S. 160 (1948), involved the question of whether the Enemy Alien Act remained in effect after the cessation of hostilities with Germany. Guided by separation of powers considerations, the court held that the executive determination that the Act remained in effect was binding on it. Similar considerations are not present in this case. Any doubts in that regard have been dispelled by the Department of State letter which states specifically "that foreign policy interests do not require U.S. courts to refrain from reviewing acts of foreign states on the merits."

hostilities and the surrender of the Pakistani army on December 16, 1971.

As discussed in Appellee's Supplemental Brief, the mere cessation of hostilities has in a number of cases terminated a state of war. See Appellee's Supplemental Brief at 25-26. Where, as in the present case, a civil war for independence was involved, recognition has been granted the former rebels by the mother country, there has been a resumption of friendly relations, and neither State has manifested either an intention to resume the conflict or to negotiate a formal treaty of peace, the only conclusion possible is that the state of war ended with the cessation of hostilities. There has not been, and as a practical matter because of India's geographic position there could not be, further armed conflict between the rebels and Pakistan after December 16, 1971.

D. Confiscation Of Private Property Of Enemy Aliens Is Contrary To International Law Even If It Occurs During Wartime. (Question Nos. 3 and 4)

Even if it were assumed that a war between Bangladesh and Pakistan existed and continued until after promulgation of the various nationalization decrees, such decrees would be invalid under United States law and policy and international law. The decrees taken together were not temporary or emergency measures, but rather final,

irrevocable expropriations of foreign-owned property without compensation.

United States law and public policy does not condone such seizures of private property even if they technically occur in time of war. United Bank Limited v. Cosmic Int'l, Inc., 542 F.2d 868, 877 (2d Cir. 1976). Although United States public policy will not be applied by our courts to prevent exercise of the war powers by the political branches of our government, our courts will not demur in the case of the exercise of war powers by foreign states and should, unless the act of state doctrine prevents them from doing so, examine any such confiscations in the light of our public policy. See Ludecke v. Watkins, 335 U.S. 160, 171-73 (1948); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156-57 (1919), and discussion in Appellee's Main Brief on Appeal at 25-26.

The confiscation of private property, even from enemy aliens in time of war, is similarly contrary to international law as recognized in the United States. The Hague Convention No. IV of 1907, Laws and Customs of War on Land, which has been ratified by the United States, provides in part "private property . . . must be respected [and] . . . cannot be confiscated." Regulations, Article 23(g), 36 Stat. 2277, T.S. No. 539. The U.S. Department of the Army

Field Manual, Law of Land Warfare, ¶ 406 at 152 (1956), recognizes this principle of international law.

American courts have refused to upset seizures by the United States of property of enemies of the United States; however, these decisions do not indicate, much less erect, a rule of international law validating all such seizures. In the litigation arising out of seizures from enemies of the United States, our courts have not been able to consider whether international law has been observed or violated. See, e.g., Miller v. United States, 78 U.S. (11 Wall.) 268, 305-06 (1870). Judicial inquiry in these cases has been limited to the interpretation of domestic law; questions of international law have not been reached. In Tag v. Rogers, 267 F.2d 664 (D.C. Cir. 1959), cert. denied, 362 U.S. 904 (1960), for example, the court ruled that it could not consider whether the Trading with the Enemy Act violated international law because it was bound to recognize treaties, statutes and constitutional provisions

> as superior to canons of international law. . . . There is no power in this Court to declare null and void a statute adopted by Congress or a declaration included in a treaty merely on the ground that such provision violates a principle of international law.

267 F.2d at 666.

On the other hand, where no treaty, statute or

constitutional provision is controlling, it is proper for the court to decide the case on principles of international law:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.

The Paquete Habana, 175 U.S. 677, 700 (1900).

In the present case international law (as well as the law and public policy of the United States) requires that Bangladesh's confiscatory decrees not be enforced.

E. Recognition Of Bangladesh By The United States Does Not Validate Its Confiscation Of The Private Property Of Pakistani Nationals. (Question No. 6)

There are at least three reasons why recognition of Bangladesh by the United States does not validate the attempted confiscation of the funds at issue here. First, recognition does not, as Appellants appear to argue, render the act of state doctrine applicable to extraterritorial confiscations or place the newly recognized State in any better position than it would have been had the United States recognized it at the time of confiscation. More-

over, Oetjen v. Central Leather Co., 246 U.S. 297 (1918), and Ricaud v. American Metal Co., 246 U.S. 304 (1918), are concerned with the physical seizure of property within what later became the territory of the newly recognized State and the defensive use of the act of state doctrine. In the instant case, the physical property was outside of the territory of Bangladesh when confiscation was attempted, and an affirmative use of the act of state is an essential element of the Bangladeshi Claimants' case. Finally, it should be pointed out that the confiscatory action on which the Bangladeshi Claimants rely took place prior to the commencement of existence of Bangladesh and, therefore, the status of such action is not affected by recognition.

With respect to this final point, Appellants fail in their discussion of Question No. 6 to consider the critical problem of when the State of Bangladesh commenced its existence, even though their own citations show that recognition has no retroactive effect prior to the "commencement of . . . [the] existence" of the State recognized. As we noted in our Supplemental Brief, it appears unlikely that Bangladesh came into existence before the withdrawal of Indian troops in March 1972, Appellee's Supplemental Brief at 19-20, which was after promulgation of the Abandoned Property Order, upon which the Bangladeshi Claimants base their claims. That being the case, recognition, even

if its effect is retroactive, does not permit application of the act of state doctrine to the Abandoned Property Order.

F. No Compensation Is Payable To Muslim Bank Under The Nationalisation Order. (Question No. 7)

Appellants seem to admit that no compensation would be payable under the Nationalisation Order inasmuch as the Abandoned Property Order was the decree under which Bangladesh sought to obtain an interest in the subject matter of this litigation. Mr. Kaiser's equivocations on this issue are counterbalanced by the more candid admission in the Appellants' Supplemental Brief that compensation does not appear to be payable under the Nationalisation Order. Appellants Supplemental Brief at 10.

G. Muslim Bank Is Not Aware Of Any Negotiations Between Pakistan And Bangladesh Concerning The Subject Matter Of This Litigation. (Question No. 8)

Mr. Kaiser's affidavit concerning alleged discussions between the governments of Pakistan and Bangladesh is astonishingly vague. It does not give either counsel or the Court any guidance as to the nature of the discussions between the governments or the likelihood that the claims presented here would ever be tabled for discussion and possible resolution.

The reasons for Mr. Kaiser's vagueness are apparent in view of the information which we have recently received from Muslim Bank concerning the nature of the "discussions" which actually took place last summer.* It appears that the Bangladesh delegation suggested that this litigation might be settled by negotiations. This suggestion (which came several months after the District Court's ruling on behalf of Muslim Bank), was not agreed to by the delegations, but was referred by them to their respective governments for a decision on whether the Bangladeshi proposal should be further discussed. The Government of Pakistan has not yet made any decision with respect to further discussions, and neither it nor the banking delegation has rescheduled further meetings with representatives of Bangladesh to consider either the principle proposed by the Bangladesh delegation or the substance of that proposal.

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* The information set forth above concerning the Bangladeshi proposal was not known to Muslim Bank when Appellee's Supplemental Brief was filed. Mr. M. A. Faruqui, a member of the Pakistan Banking Council, who was part of the delegation led by the governor of the State Bank of Pakistan to Bangladesh in August 1977, has, however, now provided such information to Muslim Bank. Mr. Faruqui's affidavit will be filed with the Court prior to the date scheduled for reargument.

Muslim Bank, which has invested substantial time and funds in carrying on the instant litigation as a private litigant for more than 5 years, should not now be compelled to forego its judicial remedies because of a unilateral suggestion which faces an entirely unknown future.

H. Vacation Of The Judgment Of The District Court To Permit Negotiations Between Pakistan and Bangladesh Is Inappropriate. (Question No. 9)

Our position with respect to the impropriety of vacating the District Court's judgment to allow negotiations between Pakistan and Bangladesh is set out at length in our Supplemental Brief at 32-35. Some further comment on the applicability of principles developed in federal abstention cases is, however, appropriate.

First, it should be observed that the concerns for preservation of the federal system do not, as conceded by Appellants, apply in the present context. No deference need be shown to the Bangladesh courts, which have not considered and most likely will not consider Bangladesh's confiscatory legislation. No deference need be shown to putative negotiations between Pakistan and Bangladesh which are not now in progress and may never take place.

Second, Louisiana Power & Light Co. v. City of

Thibodaux, 360 U.S. 25 (1959), and Meridian v. Southern Bell T. & T. Co., 358 U.S. 639 (1959), involve situations in which the state law upon which a decision by the federal court had to be based was vague and had not been authoritatively interpreted by the state courts. No similar situation exists here. The applicable law is clear; no further clarification can be expected from any source. Efforts by the Bangladeshi Claimants to fit the instant case within Meridian and Thibodaux are, to say the least, far fetched. The absence of any compensation under the laws of Bangladesh is conceded by Appellants. See page 13, supra. The Bangladeshi Claimants thus cannot effectively argue that this Court should stay proceedings pending a Bangladesh judicial interpretation of vague legislation. Here the legislation is not only clear, but also there appears to be no legitimate expectation that such an interpretation will ever be made.

It is suggested that Thibodaux turns upon the Court's recognition of expropriation proceedings as being peculiarly appropriate subjects for abstention. It is clear, however, that Thibodaux turned not on some special deference to the exercise of eminent domain powers but rather on uncertainties as to the proper interpretation of "legislation with much local variation [to be] interpreted

in local settings." 360 U.S. at 28. This fact is made especially clear in County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959), decided the same day as Thibodaux. There the Court observed:

> It is suggested, however, that abstention is justified on grounds of avoiding the hazard of friction in federal-state relations any time a District Court is called on to adjudicate a case involving the State's power of eminent domain, even though, as in this case, the District Court would simply be applying state law in the same manner as would a state court. But the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is no more mystically involved with 'sovereign prerogative' than a State's power to regulate . . . a host of other governmental activities carried on by the States and their subdivisions . . . .
>
> Furthermore, the federal courts have been adjudicating cases involving issues of state eminent domain law for many years, without any suggestion that there was entailed a hazard of friction in federal-state relations.

360 U.S. at 191-92 (emphasis supplied).

Third, Martin v. Creasey, 360 U.S. 219 (1959), and Landis v. North American Co., 299 U.S. 248 (1936), involved federal court stays of other actions which were underway at the time. Here, of course, no other proceedings for the disposition or simplification of the claims presented at bar are even vaguely underway. Furthermore, as recognized in Landis, a stay is appropriate only if the movant can show that he will suffer harm by being

forced to proceed and that the other parties will not suffer by reason of the stay. 299 U.S. at 255. Appellants cannot show that they will suffer harm if the case proceeds. On the other hand, during any stay, Muslim Bank will continue to be deprived of the use of its funds and may have its property become the subject of negotiations outside its control which, if successful, will likely give it less than full value for its loss. Finally, the Bangladeshi Claimants have by their own acts committed this case to a decision by the federal courts and are, it seems to us, equitably estopped from objecting to having this case proceed to judgment.

II

THE HICKENLOOPER AMENDMENT APPLIES TO BAR RECOVERY BY THE BANGLADESHI CLAIMANTS

The State Department takes the position that the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), applies only to takings from U.S. citizens and thus does not apply in the present context. We do not believe that the cases cited by the Department are conclusive with respect to this aspect of the scope of the Hickenlooper Amendment since neither Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976),

nor Occidental of UMM Al Qaywayn, Inc. v. Cities Service Oil Co., 396 F. Supp. 461 (W.D. La. 1975), presented that issue squarely. Nonetheless, even assuming that the Amendment is not available to non-United States citizens, it should apply in the present case.

Golodetz, not Muslim Bank, is the party which is raising the Hickenlooper Amendment as a defense. Golodetz is an American citizen. Had Golodetz turned over to Muslim Bank the sales price of the jute, there surely would be no dispute as to the propriety of its asserting the Amendment as a defense in a later action against it by the Appellants. The plain language of the Amendment can not be read to exclude its application in such a case. Moreover, the legislative history of the Hickenlooper Amendment reveals that it was designed to prevent a situation in which an American defendant would be threatened with the prospect of double liability as a result of a foreign confiscation. The Senate report states:

> The law does not prevent banks, insurance companies and other financial institutions from using the act of state as a defense to multiple liability upon any contract, dispute or insurance policy in any case where such liability [sic] has been taken over or expropriated by a foreign state.

S. Rep. No. 170 on S. 1837, 89th Cong., 1st Sess. 19 (1965). The law was designed to protect American citizens; accordingly, it should be construed not only to preserve existing defenses for American defendants but also to provide a new

defense whenever its requirements are met. Finally, the legislation was designed to prevent the United States from becoming a thieves' market. See Hearings on H.R. 7750 Before the House Foreign Affairs Committee, 89th Cong., 1st Sess. 578 (1965). In the instant case, if any property was taken by Bangladesh within its territory, a "thief" has come to our courts to collect its ill-gotten gains. The Hickenlooper Amendment prevents it from being able to do so.

If this Court finds it necessary to pass upon the applicability of the Hickenlooper Amendment to decide this case, which we do not believe to be essential to affirm the decision below, it is submitted that the Amendment applies here.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed in all respects.

Dated: New York, New York
December 30, 1977

Respectfully submitted,

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